

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

FILED

November 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
NO. M1999 00963CCAR3CD

Appellee,

V.

KENNETH R. ALLEN,

Appellant.

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C.C.A.

WILLIAMSON COUNTY

HON. TIMOTHY EASTER, JUDGE

(MOTION TO SET
ASIDE ORDER DENIED)

FOR THE APPELLANT:

KENNETH R. ALLEN
#97731, CCA, P.O. Box 279
Clifton, TN 38425

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

GEORGIA BLYTHE FELNER
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

RON DAVIS
District Attorney General
P.O. Box 937
Franklin, TN 37065

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

In September of 1982, the Williamson County Grand Jury indicted Petitioner Kenneth R. Allen for aggravated rape and assault with intent to commit murder. On October 22, 1982, Petitioner pled guilty to aggravated rape and he received a sentence of thirty years. On February 23, 1999, Petitioner filed a “Motion for Correction of an Illegal Judgment & Sentence Before the Court” in the Williamson County Circuit Court. On February 25, 1999, the trial court denied the motion on the ground that the court did not have jurisdiction over the matter. Petitioner challenges the denial of his motion, raising the following issue: whether the trial court erred when it refused to correct the judgment and sentence in this case. After a review of the record, we affirm the judgment of the trial court.

In Petitioner’s motion, he contended that he was entitled to relief pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure. Rule 36 provides:

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

However, Petitioner did not claim in his motion, nor does he claim on appeal, that the judgment in this case contains a “clerical error.” Rather, Petitioner claims that he was erroneously sentenced under the law in effect at the time of sentencing instead of the law in effect at the time of the commission of the offense. Thus, Rule 36 is clearly inapplicable to this case.

In essence, Petitioner is apparently contending that if he had been sentenced under the law in effect at the time of the commission of the offense, his sentence would have expired and therefore, he is entitled to be released from incarceration. Thus, it appears that Petitioner intended to file a petition for habeas corpus relief. Under Tennessee Code Annotated section 29-21-105, a petition for habeas corpus relief

should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge.

Tenn. Code Ann. § 29-21-105 (1980). Although Petitioner is incarcerated in Wayne County, he filed his motion in Williamson County. Petitioner has failed to provide any explanation for not filing in Wayne County. Thus, Petitioner's motion was clearly subject to summary dismissal if treated as a petition for habeas corpus relief.

In addition, we have reviewed the record available to us on appeal and examined the issue presented by the Petitioner on its merits. We conclude that the sentence received by Petitioner is not in direct contravention of any statute in existence at the time his sentence was imposed, and therefore the sentence is not void or illegal to authorize relief by petition by writ of habeas corpus. Taylor v. State, 995 S.W.2d 78, 84 (Tenn. 1999); State v. Burkhardt, 566 S.W.2d 871, 873 (Tenn. 1978).

The trial court could have treated Petitioner's motion as a petition for post-conviction relief. See Tenn. Code Ann. § 40-30-205(c) (1997). However, even if treated as a petition for post-conviction relief, Petitioner's motion was still subject to summary dismissal. Although there was no limitation as to when a post-conviction petition could be filed when Petitioner pled guilty and was sentenced in 1982, the Tennessee Legislature enacted a statute of limitations in 1986 which provided that

A prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred.

Tenn. Code Ann. § 40-30-102 (1986) (effective July 1, 1986). This new limitations period applied to existing causes prospectively from the effective date of the statute. Carter v. State, 952 S.W.2d 417, 418 (Tenn. 1997). Petitioner was convicted and sentenced on October 22, 1982, and there is no indication that Petitioner pursued a direct appeal or that any exception that would toll the statute of limitations applies

in this case. Thus, the statute of limitations expired on July 1, 1989, and Petitioner's motion filed February 23, 1999, was clearly untimely.

For the reasons stated above, we AFFIRM the judgment of the trial court dismissing Petitioner's motion.

THOMAS T. WOODALL, Judge

CONCUR:

JERRY L. SMITH, Judge

NORMA McGEE OGLE, Judge